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No. 82-252

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DOMINICK PHILIP DEBENEDICTIS, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner's Constitutional Right of due process was violated as a result of the Court denying him a valuntariness hearing and permitting Respondent to put into evidence statements made by Petitioner.

2. Whether Petitioner was denied a fair trail as a result of the Court taking his motion for a judgement of acquittal under advisement.

3. Whether Petitioner was denied a fair trial as a result of the Court denying him an opportunity to present his case after the Respondent had been allowed to reopen and subsequently reclosed it's case.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. _____

DOMINICK PHILIP DEBENEDICTIS, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI

JURISDICTION

This matter originated as a result of a Federal Grand Jury Indictment wherein Defendant was accused of willfully and knowingly making a false statement in an application for a passport in violation of

18 U.S.C. 1542. The case was tried to a jury in the Federal District Court, District of Arizona, which resulted in judgement being entered against Petitioner with a finding of guilty on June 17, 1981, a copy of said judgement appended hereto as Exhibit A. Defendant was sentenced on the 20th day of July, 1981, by the Hon. Earl H. Carroll. On the 29th day of July, 1981, Defendant filed his notice of appeal with the United State Court of Appeals, Ninth Circuit, appealing from the judgement and sentence. The matter was submitted to the Court on February 5, 1982, appended hereto as Exhibit B, affirming the judgement of the lower Court. On March 30, 1982, Petitioner pursuant to Rule 40, Federal Rules of Appellate procedure filed for rehearing with the United States Court of Appeals.

On April 30, 1982, an Order was entered for the United States Court of Appeals for the Ninth Circuit amending the Memorandum disposition of March 17, 1982, and further denying the petition for rehearing, a copy of said Order being appended hereto as Exhibit C.

Jurisdiction is conferred by 28 USC 1254 or 1255, this being an application for Writ of Certiorari to determine whether such holdings by both the trial and Appellate Courts is repugnant to the Constitution of the United States.

RELEVANT CONSTITUTION AND STATUTORY PROVISIONS

Amendment V, United States Constitution

"No person shall be held to answer for a capital, or otherwise infamous crime. unless on a presentment or indict-

ment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life. liberty, or property, without due process of law; nor shall private property be taken for public use. without just compensation."

STATEMENT OF THE CASE

The facts relevant to this Appeal initiate with the testimony of the Respondent's first witness, special agent OVIDIO CERVANTES of the F. B. I. Over Petitioner's objection agent CERVANTES was permitted to testify as to a conversation between agent CERVANTES and the Peti-

tioner, whereat Petitioner made certain statements in answer to agent CERVANTES questions, and certain statements made by Petitioner after he was placed under arrest. Prior to Petitioner's statements being put into evidence, Petitioner had requested a voluntariness hearing for the purpose of determining whether the statements were made voluntarily (see reporter's transcript, pages 45 and 47).

At the close of the Respondent's case, Petitioner made a motion for a directed verdict and judgement of acquittal (reporter's transcript, pages 241 and 242). The motion was taken under advisement, despite the fact that none of the witnesses had identified the Petitioner at the close of the Respondent's case. At the close of the Government's case, and after Petitioner had rested, and awhile the motion for judgement of

acquittal was still under advisement, the Prosecution was permitted to reopen it's case. After the presentation of this additional evidence, the Prosecution again rested. The Court immediately had the Prosecution proceed with it's opening argument (reporter's transcript, page 246), without giving Petitioner an opportunity to present a case and while still holding the Motion for Judgement of Acquittal under advisement.

ARGUMENT

1. Petitioner's Constitutional Right Of Due Process Was Violated As a Result Of The Court Denying Him A Voluntariness Hearing And Permitting Respondent To Put Into Evidence Statements Made By Petitioner.

When agent CERVANTES was first questioned concerning conversations he had with Petitioner, Petitioner timely objected thereto on the basis that any such statements made by Petitioner were not done so voluntarily. At that time, Petitioner also requested a voluntariness hearing to determine this issue. While the Court did permit extensive testimony on the part of agent CERVANTES, on the question of whether these statements were made voluntarily, the Court never granted a voluntariness hearing and Petitioner was never given the opportunity to present witnesses or further evidence out of the presence of the jury to consent this issue. Consequently, the Court's ruling that there was no evidence that the statements were not made voluntarily resulted from a denial of opportunity to present such evidence.

By admitting the statements made by Petitioner over Petitioner's objection and in the absence of a full voluntariness hearing, the Court denied the Petitioner due process and thereby committed reversible error. Jackson v. Denno, A 4 S. Ct. 1774 (1964).

> It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession, Rogers v. Richmond, 365 U.S. 534, 81 S. Ct. 735, 5 L.Ed.2d 760, and even though there is ample evidence aside from the confession to support the conviction. Malinski v. New York, 324 U.S. 401, 65 S. Ct. 781, 89 L.E.d. 1029; Stroble v. California, 343 U.S. 181, 72 S. Ct. 599, 96 L.Ed. 872; Payne v. Arkansas, 356 U.S. 560, 78 S. Ct. 844, 2 L.Ed. 2d 975. Equally clear is the defendant's constitutional right at some stage in the proceedings to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession. Rogers v. Richmond, Supra. In our view, the New York procedure employed in this case did not afford a reliable

determination of the voluntariness of the confession offered in evidence at the trial, free of a conviction based upon a coerced confession and therefore cannot withstand constitutional attack under the Due Process Clause of the Fourteenth Amendment. We therefore reverse the judgement below denying the writ of habeas corpus. Jackson v. Denno, supra at 1780-1781.

The Respondent's case relied heavily upon the agent CERVANTES' testimony that the Petitioner admitted his picture appeared in a certain identification card. Consequently, such statement is in the nature of a confession that Petitioner had his picture taken for such I.D. card. Therefore, pursuant to the holding in Jackson v. Denno, supra, Petitioner had a right to object to the use of such confession and to have a fair hearing and reliable determination on the issue of voluntariness.

> A defendant objecting to the admission of a confession is entitled to a fair hearing in which both the underlying factual issues and the voluntariness of his confession are actually and reliably determined. Jackson v. Denno, supra at 1783

Petitioner did object to such admissions and was, therefore, entitled to a fair hearing on the issue of the voluntariness of such statements. However, the procedure used by the Court was similar to that used by the Court in the Jackson v. Denno case in that the Trial Judge merely took testimony of agent CERVANTES to make a preliminary determination and then left the ultimate determination of its voluntary character and also its truthfulness to the same jury that was to determine Petitioner's guilt or innocence.

As stated before, Petitioner was given no opportunity to present witnesses of his own concerning the voluntariness of the statements. As testified by agent CERVANTES, such witnesses did in fact exist, including not only the Petitioner, but also other officers and Petitioner's wife and son. By making the determination that the statements were voluntary, or that there was no evidence to substantiate that they were no voluntary, the Court committed reversible error by not holding a full voluntariness hearing.

It is Petitioner's contention that the Court mistakenly treated Petitioner's objection merely as a Miranda question as to when Petitioner is entitled to have his rights read. The real issue presented in this case is the voluntariness of the statements made by Petitioner and whether he is entitled to a fair hearing to make

that determination. It is Petitioner's position that officers of the government can not force a statement whether the Petitioner is in or out of custody and whether or not he is a focus of their investigation. Even if agent CERVANTES was not required to have read Petitioner his Miranda warnings prior to questioning him concerning the identification, the statement obtained from the Petitioner should not be admissable if it was not voluntary; and the statement should not be ruled voluntary without a full voluntariness hearing. The mere fact that statements made by Petitioner were attempted to be used by the Respondent, that Petitioner objected thereto, and requested a full voluntariness hearing entitled Petitioner to such a hearing, pursuant to the holding in Jackson v. Denno, supra. This was not done.

2. Petitioner Was Denied A Fair Trial As a Result Of The Court taking his motion for a judgement of acquittal under advisement.

Petitioner made a timely motion for a directed verdict and judgement of acquittal. At that time, the Court took the matter under advisement (Reporter's Transciprt, page 342, line 22) in spite of the fact that the Petitioner had not been identified by any of the witnesses presented by the Respondent. It is elementary that the identification of the Defendant is an essential element in any case. After the Petitioner had rested his case, the Prosecution even admitted that the Defendant had not been identified (see reporter's transcript, page 244). The evidence as it existed at the time the Government originally closed its case and Petitioner made his motion, was insufficient to go to the jury in that an

essential element was completely lacking. For this reason, the Court should have granted Defendant's motion as opposed to taking it under advisement.

Furthermore, by taking the motion under advisement the Court put Petitioner in the untenable position of having to second guess the Court. Petitioner was unnecessarily placed in a position of having to take a chance and present additional evidence which could potentially supply the Prosecution with any missing elements of its case or take a chance that an element was missing and the court would so rule by not presenting any evidence. Petitioner contends that the Court's placing him in this position by taking his motion under advisement while continuing with the trial in and of itself

denied Petitioner a fair trial in violation of his Fifth Amendment Due Process Rights.

The Court's error was compounded by the fact that in reliance thereon and in reliance on the fact that the Respondent had rested the Petitioner rested his case based upon the evidence which had theretofore been adduced. Subsequently, over Defendant's objection, the Court permitted the Prosecution to reopen its case to supply this essential element which Defendant understood to be missing at the time Defendant chose to present no evidence. Rule 29 (a) and (b), Federal Rules of Criminal Procedure, states:

> "Rule 29. Motion for judgement of acquittal.
>
> (a) Motion before submission to jury. Motions for directed verdict are abolished and motions for judgement of acquittal shall be used in their place. The Court on motion of a defendant or of its own motion

shall order the entry of judgement of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgement of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

(b) Reservation of decision on motion. If a motion for judgement of acquittal is made at the close of all the evidence, the Court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict."
(Emphasis supplied)

It is thus evidently clear from the wording of the rule itself that taking the motion under advisement is discretionary only if made after the close of all of the evidence and is prohibited where made at the close of the prosecution's case, as was done here.

> "The Court may reserve a ruling on a motion for acquittal made at the close of all the evidence and submit the case to a jury. There's no such provision where the motion is made at the close of the government's case. The reservation to a Defendant of the right to offer testimony after the denial of a motion for acquittal made at the close of the government's case would be a futile thing if the Court could reserve it's ruling and force the Defendant to an election between resting and being deprived of the benefit of the motion. The introduction of evidence after the denial of a motion made at the close of the prosecution's case waives any error in the denial of the motion. T'Kach v. United States, 5 Cir., 1957, 242 F.2d 937. The ruling on the motion should have been made before the Appellant rested." Jackson v. United States, 250 F.2d 897 (1958).

This same reasoning was followed in the Ninth Circuit case of Sullivan v. United States, 414 F.2d 714 (1969) wherein the Court stated "it is mandatory requirement of Rule 29(a), that a motion for judgement of acquittal, made at the close of the government's evidence, be ruled upon before Defendant is required to

proceed with his evidence. Furthermore, Rule 29(a) does not require a Defendant to demand an immediate ruling in order to preclude the trial Court from reserving decisions." See also Cooper v. United States, 321 F.2d 274 (1963).

While the Court in Sullivan, supra, did go on to say that the failure to rule in that case was not prejudicial because the government's evidence, as it then stood, was sufficient to support the verdict, such was not the case here. At the time of Defendant's original motion, at the close of the prosecution's case, the Defendant had not been identified. Thus, a crucial element of the government's case was lacking. The evidence, as it then stood at the time of Defendant's motion, was such that it should have been granted.

The prosecution has attempted to present a red herring by arguing Defendant was not prejudiced by the government being permitted to re-open its case. However, unlike the case of Untied States V. Sisack, 527 F.2d 917 (1979), which the government cited as analogous, the Defendant did not waive this error by presenting any evidence. Defendant was forced, by the Court's taking the motion under advisement to not present a case in order to avoid waiving the error. See Jackson v. United States, supra at 901. As Defendant did not put on evidence, as was done in Sisack, supra, and Defendant had not been identified, the ruling on the motion should have been granted before the Defendant rested. Such error was therefore clearly prejudicial. While it is not clear from the opinion in Morgan v. United States, 380 F.2d 686 (1968), also cited by

the government, whether Defendant presented evidence in that case, there appears to be indications that he did so. Morgan, supra, is also distinguishable in that a motion for judgement of acquittal was not taken under advisement at the close of the Plaintiff's case. Although the government's motion to re-open may have been made diligently in this case, under the circumstances, it was not with sufficient diligence to prevent prejudice to Defendant, as it was made after Defendant's motion had already been taken under advisement in the absence of an essential element and after Defendant had rested, putting on no evidence. As Defendant did not waive the Court's error of taking the matter under advisement by presenting evidence while the motion was

being held under advisement, Defendant was prejudiced and the verdict should be reversed.

The United States Court of Appeals, Ninth Circuit seemed to agree in the first Memorandum opinion of March 17, 1982, (Exhibit B) although erring in the recitation of the sequence of events during the trial. The Court of Appeals seemed to commit additional error by subsequently amending its decision on April 30, 1982, (Exhibit C), presenting further grounds for reversal.

3. Petitioner Was Denied A Fair Trial As A Result Of The Court Denying Him An Opportunity To Present His Case After The Respondent Had Been Allowed To Reopen And Subsequently Reclosed It's Case.

Although the Respondent was entitled to present the final testimony, in the form of rebuttal evidence, it can not be argued here that such final evidence

constituted rebuttal. Petitioner having rested its case without presenting any evidence, there was nothing to rebut. The Respondent then proceeded to present additional testimony from agent CERVANTES. At the end of the direct testimony, Petitioner had no questions on cross examination. The Respondent then stated that it had nothing further and the Court at that point stated "very well".

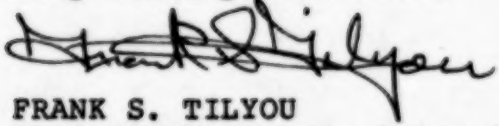
"Your may proceed then Miss Budge (Prosecuting Attorney) with the opening argument for the Government" (reporter's transcript, page 346). Either the Respondent had rested previously completely missing an essential element of its case, or it closed at this point whereat the Court immediately permitted it to proceed with its closing argument. If it closed at the earlier point, as argued previously, Petitioner's motion for

directed verdict and judgement of acquittal should have been granted. If it was closed at this later point, Petitioner should have been given an opportunity to present a case, had he so chosen. As evidenced by the transcript this opportunity was not given. Consequently, Petitioner's Fifth Amendment right to due process was violated.

CONCLUSION

For the reasons as stated herein, it is respectfully requested that this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,



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DOMINICK PHILIP DEBENEDICTIS

UNITED STATES DISTRICT COURT

FOR THE STATE OF ARIZONA

UNITED STATES OF AMERICA,

Plaintiff, NO. CR 81-8 PHX EHC

vs. JUDGEMENT AND PROBATION/COMMITMENT ORDER

DOMINICK DEBENEDICTIS,

Defendant.

In the presence of the attorney for the government the Defendant appeared in person on the 20th day of July, 1981. There being a finding/verdict of guilty.

Defendant has been convicted as charged of the offense(s) of False Statement in Application for a Passport in violation of Title 18 United States Code, Section 1542 as charged in Count 1 of the Superseding Indictment.

The Court asked whether defendant had anything to say why judgement should not be pronounced. Because no sufficient

cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years. On condition that Defendant spend six months in a jail type facility, execution of the remainder of the sentence is suspended and Defendant placed on three (3) years supervised probation.

It is Further Ordered that Defendant pay a fine of $1,000.00. Such fine is to be paid during his probationary period.

ORDER that the is to surrender to the institution designated by the Bureau of Prisons on the date and time set by said agency. Pending self surrender, the Defendant will remain subject to his

present release conditions.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgement be imposed. The Court may change conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

It is ordered that he Clerk deliver a certified copy of this judgement and commitment to the U.S. Marshal or other qualified officer.

S/ Earl H. Carroll
Earl H. Carroll
U.S. District Judge

Dated: July 20, 1981

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, NO. 81-1477

Plaintiff-Appellee, DC No. 81-008PHX

vs. MEMORANDUM

DOMINICK PHILLIP DEBENEDICTIS,

Defendant-Appellant

Appeal from the United States District Court for the District of Arizona

Earl H. Carroll, District Judge, Presiding

Submitted February 5, 1982

Before: SKOPIL and SCHROEDER, Circuit Judges; and AGUILAR,[1] District Judge

DeBenedictis appeals his conviction of making a false statement in an application for a passport in violation of 18 U.S.C. S 1542. We affirm.

DeBenedictis contends that the

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[1] The Honorable Robert P. Aguilar, United States District Judge for the Northern District of California, sitting by designation.

district court failed to hold a hearing on whether certain statements made by DeBenedictis were voluntary, as required by Jackson v. Denno, 378 U.S. 368, 376-77, 380 (1964). The hearing must be out of the presence of the convicting jury. Id. at 391 & n.19. In federal court the determination of voluntariness must be made by the court. Compare Fed.R.Evid. 104(c) and United States v. James, 590 F.2d 575, 579 & n.3 (5th Cir.) (en banc), cert. denied, 442 U.S. 917 (1979) with Jackson V. Denno, 378 U.S. at 392 n.19.

In this case the district court held a voluntariness hearing. DeBenedictis contends that the district court did not permit him to put on evidence. The district court heard all of the evidence that was presented. DeBenedictis did not state that he wanted to put on evidence. He did not object to the district court's

failure to ask him whether he wanted to put on evidence. He therefore waived any objection to the procedure followed by the district court. Winston v. United States, 342 F.2d 715, 724 (9th Cir. 1965); Pacific Coast Cheese V. Wirtz, 314 F.2d 145, 148-49 (9th Cir. 1963). The district court's determination of voluntariness is clearly "ascertainable from the record." United States v. Read, 411 F.2d 582, 583 (9th Cir. 1969). See Nelson v. McCarthy, 637 F.2d 1291, 1294 (9th Cir. 1980_, cert. denied, 451 U.S. 940 (1981). Compare United States v. Brown, 575 F.2d 746, 748 (9th Cir. 1978). DeBenedictis does not argue that the trial court's determination was clearly erroneous.

DeBenedictis moved for a judgement of acquittal after the government rested. The district court took the motion under advisement, permitted the government to

reopen its case, and subsequently denied the motion. DeBenedictis contends that the district court erred in so doing.

It is error for a district court to fail to rule on a motion for judgement of acquittal, made at the close of the government's evidence, before a defendant is required to proceed with his evidence. United States v. Dreitzler, 577 F.2d 539, 552 (9th Cir. 1978), cert. denied, 440 U.S. 921 (1979); Sullivan v. United States, 414 F.2d 714, 715 (9th Cir. 1969); Sullivan v. United States, 414 F.2d 714, 715 (9th Cir. 1969); Fed.R.Crim.P. 29. In this case the district court merely postponed deciding the motion for judgement of acquittal while the government reopened its case. The defendant was not yet required to proceed. In general the district court has discretion to permit the government to reopen. E.g., United

States v. Sisack, 527 F.2d 917, 919-20 (9th Cir. 1975); United States v. Powers, 572 F.2d 146, 152-53 & n.6 (8th Cir. 1978). The district court did not abuse its discretion here. The district court even has discretion to permit reopening and defer ruling on a motion for judgement of acquittal where the purpose of re-opening is to prove venue. Morgan v. United States, 380 F.2d 686, 703 (9th Cir. 1967), cert. denied, 390 U.S. 962 (1969); United States v. McDonough, 603 F.2d 19, 22 (7th Cir. 1979). We hold that a district court may also reserve ruling on a motion for judgement of acquittal while it permits the government to reopen to identify the defendant in court. See United States v. Powers, 572 F.2d at 152-153 (permitting deferral of motion for judgement of acquittal pending reopening to test-fire firearms); United States v.

Dossey, 558 F.2d 1336, 1339 (8th Cir. 1977) (permitting deferral pending reopening to admit testimony of other crimes). Introduction of the new evidence rendered DeBenedictis' motion for judgement of acquittal premature. United States v. Dossey, 558 F.2d at 1339. DeBenedictis did not renew his motion after the government again rested. DeBenedictis did not seek to put on his own case, nor did he object to the district court's failure to ask him whether he intended to put on evidence. He has therefore waived any objection on this point. E.g., Winston v. United States, 342 F.2d at 724.

Accordingly, the judgement appealed from is AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee No. 81-1477

vs. DC CR 81-8 EHC

DOMINICK PHILLIP DEBENEDICITIS,

Defendant-Appellant.

APPEAL from the United States District Court for the District of ARIZONA (Phoenix).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of ARIZONA (Phoenix) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgement of the said District Court in this Cause be, and hereby is affirmed.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	No. 81-1477
Plaintiff-Appellee,	DC No.81-008PHX
vs.	ORDER
DOMINICK PHILLIP DEBENEDICTIS,	
Defendant-Appellant.	

Appeal from the United States District Court for the District of Arizona
Earl H. Carroll,
District Judge, Residing

Before: SKOPIL and SCHROEDER, Circuit Judges; and AGUILAR[1], District Judge

The memorandum disposition of the above-named case, filed March 17, 1982, is ordered amended. The sentence which begins at page 2, line 26 is ordered deleted. In its place is substituted; "The district court did not rule im-

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[1] The Honorable Robert P. Aguilar, United States District Judge for the Northern District of California, sitting by designation.

mediately on DeBenedictis' motion for judgement of acquittal. The district court's action merely had the effect of postponing a ruling on the motion until after the government had reopened its case."

The panel has also voted to deny the petition for rehearing. The petition for rehearing is denied.

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FILED
DEC 1 1982
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OCTOBER TERM, 1982

DOMINICK PHILIP DEBENEDICTIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial court gave petitioner an adequate opportunity to present evidence at a mid-trial voluntariness hearing.

2. Whether a new trial is required because the trial court deferred ruling on petitioner's motion for a judgment of acquittal made at the close of the government's case and allowed the government to reopen its case.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-252

DOMINICK PHILIP DEBENEDICTIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B) and order amending that opinion (Pet. App. C) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 1982 (Pet. App. B). A petition for rehearing was denied on April 30, 1982 (Pet. App. C). The petition for a writ of certiorari was filed on June 29, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Arizona, petitioner was convicted of knowingly making a false statement in a passport application, in violation of 18 U.S.C. 1542. He was sentenced to five years' imprisonment, with four and one-half years suspended, and was placed on probation for three years. He was also fined $[illegible],000. The court of appeals affirmed (Pet. Apps. A and C).

The evidence at trial showed that on January 16, 1980, petitioner appeared before a deputy court clerk in Phoenix, Arizona, and filed an application for a passport in the name of a person who had died in infancy 50 years earlier. Petitioner presented in support of the application his own photograph and a copy of the dead infant's birth certificate, which he had obtained earlier (Tr. 27-39). Petitioner had also secured in the dead infant's name an identification card issued by the Arizona Department of Motor Vehicles. Such an identification card was customarily required to be shown to the clerk by a passport applicant (Tr. 153). After completing the application, petitioner swore to the truth of its contents (Tr. 155).

Thereafter, the State Department referred the application to the FBI for investigation (Tr. 27-28). On March 21, 1981, two FBI agents located petitioner outside the home of his estranged wife. After petitioner identified his photograph on the Arizona Department of Motor Vehicles identification card, one agent arrested him (Tr. 50). Advised by the other agent of his rights to remain silent and to counsel, petitioner stated that he did not wish to waive his rights (Tr. 65). The agent did not question him. As petitioner was being transported to jail, however, he remarked (Tr. 66-67): "I didn't even get the passport. How can I be charged with a passport violation?" One agent responded that petitioner was charged with making a false statement on the passport application. Several minutes later, petitioner said (Tr. 67): "[T]he mess I get myself into for trying to help a friend."

ARGUMENT

Petitioner contends that certain procedural rulings by the district court, none of which he challenged in a timely fashion at trial, require reversal.

1. Petitioner did not file a pretrial motion challenging the admissibility of the statements uttered to the agents

after his arrest. At trial, however, petitioner interposed an objection when one of the arresting agents was about to testify about the statements. The court excused the jury and conducted a hearing at which the agent related the events surrounding the utterances and was cross-examined by defense counsel (Tr. 46-75). The court then indicated its view that the statements were admissible because they were freely volunteered without any prompting on the part of law enforcement officers (Tr. 75-76). After a luncheon recess, the court inquired of counsel if they had "[a]nything further" (Tr. 76), and both counsel presented legal arguments on the voluntariness question. Defense counsel then moved for a mistrial based on the court's ruling, alleging that the statements were inadmissible because involuntarily made. After denying the motion (Tr. 81), the court summoned the jury, and, without further objection, the witness disclosed petitioner's utterances to the jury (Tr. 88).

Petitioner nonetheless contends (Pet. 6-12) that he was not accorded a voluntariness hearing, alleging that he was not given the opportunity to present evidence of his own out of the jury's presence. This contention is plainly belied by the record, which shows not only that a voluntariness hearing was conducted, but also that, despite the untimely manner in which it was raised (Fed. R. Crim. P. 12(b)(3)), the court considered the issue of admissibility of the statements from the standpoint of a waiver of *Miranda* rights as well as from the perspective of the absence of any subtle coercion (see Pet. 11-12). Cf. *Rhode Island* v. *Innis*, 446 U.S. 291 (1980). At no time did petitioner indicate that he desired to testify at the hearing, nor did he indicate that he had any other evidence to present before—or even after—the court's ruling and the presentation of the testimony to the jury. The court of appeals correctly held that the district court had held a voluntariness hearing and that petitioner, by never indicating any desire to put on evidence or raising any objection, had waived any objection to the procedure followed by the district court (Pet. App. B, 2-3).

2. Petitioner also contends (Pet. 13-23) that the trial court erred in failing to rule on his motion for a judgment of acquittal immediately after the government had completed its case and instead allowing the government to reopen its case for the purpose of eliciting an in-court identification of petitioner as the individual who committed the offense charged. At the close of the government's evidence, petitioner moved for a judgment of acquittal, pursuant to Fed. R. Crim. P. 29(a), on the ground that there was insufficient evidence identifying him as the passport applicant (Tr. 240-241). The court responded to the oral motion by remarking that it would be taken under advisement (Tr. 241-242). Defense counsel then announced in the jury's presence that he would not produce any evidence on behalf of petitioner (Tr. 243). The court excused the jury for the purpose of conducting a charge conference in chambers.

When the court reconvened, government counsel requested leave to reopen the prosecution's case for the purpose of securing an in-court identification of petitioner from an FBI agent who had testified earlier to having investigated the offense and to having overheard the incriminating admissions uttered by petitioner. Over the objection of defense counsel, the court permitted the prosecution to reopen its case for this limited purpose (Tr. 244-245). The agent was summoned to the witness stand and made his identification, and defense counsel elected not to cross-examine him (Tr. 245-246). The parties then proceeded with closing argument. Defense counsel made no further objection to the procedure, nor did he request an opportunity to present any evidence of his own or renew his motion for an acquittal.

Petitioner contends that the court had a duty to rule on his motion for acquittal when it was made and that it erred when deciding to defer such a ruling. This contention was correctly rejected by the court of appeals. As the court

noted (Pet. App. B, 4), petitioner was entitled to a ruling on his motion made at the close of the government's case before being required to proceed with his own case. This is to avoid placing him in the position of supplying a missing element of the offense in the presentation of his own case. As the court of appeals explained (Pet. App. C, 3), however, the trial court's action in taking the motion under advisement "merely had the effect of postponing a ruling on the motion until after the government had reopened its case." The defendant had no evidence to put on and thus the court's denial of the defendant's motion (Tr. 301) was based solely on the evidence presented by the government, which plainly was sufficient to sustain a guilty verdict. Thus, the fact that the court technically did not deny the motion until after the defense had rested clearly was not prejudicial. See, *e.g.*, *United States* v. *Conway*, 632 F.2d 641, 643 (5th Cir. 1980); *United States* v. *Dreitzler*, 577 F.2d 539, 552 (9th Cir. 1978), cert. denied, 440 U.S. 921 (1979); *United States* v. *Austin*, 462 F.2d 724, 737 (10th Cir.), cert. denied, 409 U.S. 1048 (1972).

The decision to permit the government to reopen its case to correct its failure to ask its witness to make an in-court identification of the defendant was within the court's discretion. Since the additional evidence in no way surprised petitioner, the court's ruling cannot fairly be regarded as constituting an abuse of discretion. See *United States* v. *Cordero*, 668 F.2d 32, 44 n.20 (1st Cir. 1981); *United States* v. *Hinderman*, 625 F.2d 994, 996 (10th Cir. 1980); *United States* v. *McDonough*, 603 F.2d 19, 22 (7th Cir. 1979); *United States* v. *Powers*, 572 F.2d 146, 152-153 & n.6 (8th Cir. 1978); *United States* v. *Sisack*, 527 F.2d 917, 919-920 (9th Cir. 1975). The fact that a motion for acquittal had been made did not remove the trial court's discretion to allow reopening of the government's case for the taking of

additional evidence. *United States* v. *Powers, supra*; *United States* v. *Dossey*, 558 F.2d 1336, 1338-1339 (8th Cir. 1977).[1]

Petitioner also argues (Pet. 21-23) that the court did not give him an adequate opportunity to present a defense after the government had rested its reopened case. The record refutes this allegation. Throughout the trial the court had been solicitous of petitioner's requests, even to the point of interrupting the proceedings before the jury for a belated hearing on the voluntariness of his statements. When the government reopened its case, it called one witness to the stand. After that witness had completed his brief testimony the court asked the parties whether they had "anything further" to present (Tr. 246). Government counsel expressly remarked that she had nothing else; defense counsel made no statement on the record. The court then directed government counsel to proceed with her closing argument (Tr. 246).

Petitioner had ample opportunity to present a defense if he truly had intended to do so. There is no reason to suppose that the district court would have denied him the opportunity to put on evidence if he had indicated such a desire. In fact, petitioner had already disclosed his intent to rest without calling any witnesses, prior to the reopening of the government's case (Tr. 243). After the lone witness had testified in the reopened case, petitioner gave no indication

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[1]In any event, petitioner was not entitled to a judgment of acquittal at the time he made his motion. Evidence introduced by the government prior to the reopening of its case, including references to the "defendant" and to petitioner by name, testimony comparing the photograph on the passport application with his in-court appearance, and testimony identifying his handwriting and fingerprints on the application, was sufficient to sustain a guilty verdict. See Tr. 41, 44, 84-93, 164-172, 179-182, 214-222; *United States* v. *Vahalik*, 606 F.2d 99, 100 (5th Cir. 1979), cert. denied, 444 U.S. 1081 (1980).

that his intent had changed. Instead, he remained silent while the government proceeded with closing argument, and thereafter he followed with his own closing statements. Thus, the court of appeals correctly concluded (Pet. App. B, 6) that petitioner cannot now claim that he was denied an opportunity to present a defense.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1982

DOJ-1982-11